in the Singapore case of *Quek Ching Kim* v. *Reg.*[2] His Lordship in that case agreed with the attitude taken by Counsel for the Crown that having regard to the provisions of the Criminal Procedure Code before any amendment to a charge was made such amendment should be read and explained to the accused who should be called upon to plead to the charge as amended. His Lordship, agreeing with the view taken by Counsel for the Crown in that appeal, held that it was then too late to amend the charge so as to bring it within the provisions of the Common Gaming Houses Ordinance. In the result, unsatisfactory as it may be, I must hold that the trial and conviction in this case was a nullity and that the conviction must accordingly be quashed. The fine, if paid, must be refunded to the appellant.

*Conviction quashed.*

Solicitors: *Jayadeva & Zahir.*

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## THE MANAGER, SCUDAI ESTATE, JOHORE BAHRU v. NARAYANAN

[A. C. J. (Neal J.) April 6, 1960]

[J. B. — Civil Appeal No. 4 of 1959]

*Master and servant — "Misconduct" — Continuance of work after warning — Dismissal without notice — Employment Ordinance, 1955, s.14(1).*

*Labour law — Labour Officer hearing cases — Conduct.*

In this case the point in issue was whether or not the appellant as the employer by virtue of section 14(1) of the Employment Ordinance, 1955, was entitled to dismiss the respondent without notice for misconduct.

**Held:** (1) a master, with full knowledge of a servant's misconduct, electing to continue him in his service, cannot subsequently dismiss him for the offence which he had by his warning and subsequent employment condoned;

(2) however, in this case, there was clear evidence of fresh misconduct subsequent to the last warning which not only in itself constituted grounds for instant dismissal but revived the misconduct which had been condoned.

Observations on conduct of hearing of labour cases.

*Case referred to:—*

(1) *Harmer* v. *Cornelius*, 141 E.R. 94.

APPEAL from the decision of the Labour Officer, Johore Bahru.

*Ong Swee Keng* for the appellant.

Respondent in person.

**Neal J.** (delivering oral judgment): This is an appeal from the decision of the Labour Officer, Johore Bahru, given on the 22nd October, 1959, when on the complaint of the present respondent he made an order in favour of the respondent against the appellant for the payment of a sum of $14.97, being wages due to the respondent, and a sum of $90, being indemnity in lieu of one month's notice.

In the course of his grounds of judgment the Labour Officer held that the appellant could (I emphasise the word could and not should) "have given a month's notice to terminate the complainant's service instead of having given several warnings". Reading the whole of the grounds of judgment and the issues which the Labour Officer himself fixed and the evidence on the record, it is obvious that the Labour Officer had misunderstood the point in issue.

The only point in issue in this matter is whether or not the appellant as the employer, by virtue of section 14(1) of the Employment Ordinance, 1955, was entitled to dismiss the respondent without notice for misconduct. The onus of proving misconduct to justify dismissal without notice rests upon the employer. What amounts to misconduct is adequately set out in the following words of Willes J. in the judgment of the Court of Appeal in *Harmer* v. *Cornelius*[1] (at p. 98): "The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct".

In this particular case there can be no doubt that the wounding of the trees other than by accident would constitute a breach of the skill required from an experienced tapper and, except in isolated instances, would constitute misconduct. On the record there is a statement by the respondent that trees were wounded by him, the number being unknown to him, but he alleged that the wounding was not such as would have reduced the quantity of latex to be received from the trees during their life-time. The appellant, however, alleged extensive and dangerous wounding. He stated that from approximately the month of January, 1959, he had warned the respondent culminating in a warning on the 25th August that unless the respondent's work improved he would have to look for a job elsewhere. This evidence was corroborated by the appellant's Conductor, a Chinese.

In view of those warnings following conduct of the respondent which could adequately be described as coming within the definition of "misconduct", I have to consider the effect of a continuation of work after those warnings. It is clear law that a master, with the full knowledge of a servant's misconduct, electing to continue him in the service, cannot subsequently dismiss him for the offence which he had by his warning and subsequent employment condoned. On this aspect of the case the record was extremely sparse. The last warning was on the 25th August. As to any misconduct subsequent thereto the respondent stated that rubber trees were not wounded during the month he was dismissed. Even if his words were accepted, they did not cover the period of employment from the 25th August to the end of that month. I emphasise "even if his words were accepted". The evidence by the appellant and his witness is in general terms. The evidence of the appellant on the record is that "in spite of the advice and warnings, he (the respondent) failed to improve

his tapping. But his wounding increased to such an extent that it could not be tolerated any more. Hence he was dismissed on the 21st September, 1959". The witness for the appellant is perhaps a little clearer on the question whether or not some wounding took place after the final warning. This witness says "in the course of his work he was warned three times for bad tapping. In spite of this he did not improve his tapping. Hence he was dismissed on 22nd September, 1959". I emphasise the words "in spite of".

During the course of the submission I pointed out that it was unfortunate that the appellant had not given dates and details in particular rather than in general terms. Counsel for the appellant thereupon made application to me to hear additional evidence on this aspect. There being no objection by the respondent, I granted Counsel leave to call additional evidence. Accordingly the appellant was called to give evidence.

In the course of his evidence, in answer to a question put to him by me as to why he did not give the full details to the Labour Officer, he stated that the Labour Officer had confined him to answering questions and that he had had no opportunity such as he had in this Court. If that be so, then it should be pointed out to officers hearing these cases that parties appearing before them are entitled to state their case in detail and should not be confined to the answering of questions put to them by either the opposing party or the presiding officer.

The evidence recorded before me establishes clearly that the conduct of the respondent was treated seriously by the management from a point of time about August last year when his work was closely checked. As a result of a checking on or about the 25th August the respondent was called to the office and was warned. There was another inspection on the 19th September when more than 100 trees were found by the appellant himself to have been wounded. Again on the 21st September on another inspection it was discovered that about the same number of trees had been wounded.

This appeal before me is not so much as to whose evidence is to be accepted, because to a limited extent there is an admission in cross-examination by the respondent of the wounding of trees but he says that the wounding was unavoidable and he does not know the numbers.

On the whole of the evidence on the record and the evidence taken before me, I am satisfied that the decision of the Labour Officer was wrong, that the appellant has established misconduct on the part of the respondent, and that that misconduct consisted in wounding a large number of trees over a comparatively long period of time. Although the continued employment by the appellant of the respondent after the knowledge of the misconduct, that is to say wounding of the trees, amounted to condonation, in my opinion there was clear evidence of fresh misconduct subsequent to the last warning which not only in itself constituted grounds for instant dismissal but revived, according to the principles of law, the misconduct which had been condoned.

For these reasons I grant the appeal to the extent of setting aside that part of the order which orders the appellant to pay to the respondent the sum of $90 by way of indemnity in lieu of notice, on the ground that the appellant was entitled in law on the 21st September, 1959, to dismiss the respondent without notice by reason of his misconduct.

No order as to costs.

*Appeal allowed in part.*

Solicitors: *Ong Swee Keng & Co.*

## PUBLIC PROSECUTOR v. CHIAM LIANG KEE

[A. Cr. J. (Rigby J.) April 8, 1960]

[Penang — Criminal Appeal No. 8 of 1960]

*Road Traffic — Dangerous driving — Disqualification — Discretion — Road Traffic Ordinance, 1958, s.35(3).*

*Criminal Law and Procedure — Appellate Court — Powers of — Criminal Procedure Code (Cap. 21), s.316.*

This was an appeal against the inadequacy of the sentence imposed on the respondent on a conviction on the charge of dangerous driving. The respondent was driving a motor lorry following behind another lorry. In an attempt to overtake, and when his lorry drew level with the other, his lorry smashed into two cyclists who were cycling on their correct side of the road in single file from the opposite direction. Both cyclists suffered very severe injuries and were killed instantaneously. He was sentenced to three months' imprisonment and a fine of $300 or one month's imprisonment in default of payment of such fine. The particulars of the conviction were ordered to be endorsed upon his driving licence.

**Held:** the failure to impose any disqualification was not a proper or satisfactory exercise of discretion vested in the President under section 35(3) of the Road Traffic Ordinance, 1958. In the circumstances of the case, the respondent must be disqualified from holding or obtaining a driving licence for a period of three years from the date of his conviction.

**Per curiam:** the powers of an appellate Court, on an appeal from a subordinate Court, are contained in section 316 of the Criminal Procedure Code, and they include a power vested in the appellate Court to interfere with and, if necessary, alter, the exercise, or failure to exercise, of any discretionary power vested in the lower Court. The appellate Court is placed in the same position as the trial Court.

Observations of the Lord Chancellor referring to the increasing number of road casualties quoted.

MAGISTRATE'S CRIMINAL APPEAL.

*L. A. Massie* (Deputy Public Prosecutor) for the appellant.

*Lim Cheng Ean* for the respondent.

**Rigby J.** (delivering oral judgment): This is an appeal by the Deputy Public Prosecutor on the ground that the sentence imposed in this case was inadequate. The respondent was convicted on the charge preferred against him of dangerous driving, and sentenced to three months' imprisonment and a fine of $300, or one month's imprisonment in default of payment of such fine. The learned President further ordered, as, indeed, he was bound to do upon a